Office Supreme Court, U.S.
FILED
MAY 25
JOHN

In The

Supreme Court of The United States

October Term, 1963

No. 1056

DAVE LOUIS GOLDBERG and
STEVE LEKOMETROS,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. W. BRUTON
Attorney General of North Carolina

HARRY W. McGALLIARD
Deputy Attorney General

Justice Building
Raleigh, North Carolina

Counsel for the State of North Carolina,
Respondent.

INDEX

Opinion Below 1

Jurisdiction 1

Question Presented 1

Constitutional Provisions Involved 2

Statement of Case 2

Argument 2

THE FACT THAT A GRAND JURY RETURNS A TRUE BILL OF INDICTMENT BASED ON HEARSAY EVIDENCE DOES NOT VIOLATE ANY RIGHT OF THE DEFENDANTS GUARANTEED BY THE FIFTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND A DEFENDANT MAY BE REQUIRED TO STAND TRIAL AND A CONVICTION SUSTAINED WHERE ONLY HEARSAY EVIDENCE WAS PRESENTED TO THE GRAND JURY RETURNING THE INDICTMENTS 2

Conclusion 5

TABLE OF CASES

Campbell v. United States, 365 U. S. 85, 81 S. Ct. 421, 5 L. ed. 2d. 428 (1961) 4

Costello v. United States, 350 U. S. 359, 76 S. Ct. 406, 100 L. ed. 397 (1956) 3, 4

Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138 3

State v. Goldberg and Lekometros, 261 N. C. 181, 134 S. E. 2d. 334 1

FEDERAL STATUTES

Jencks Act, 18 U.S.C. 3500 4

28 U.S.C. 1257 (3) 1

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment V 2, 5

Constitution of the United States, Amendment XIV 2, 5

In The

Supreme Court of The United States

October Term, 1963

No. 1056

DAVE LOUIS GOLDBERG and
STEVE LEKOMETROS,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 261 N. C. 181, 134 S. E. 2d 334, and is printed in the appendix of the Petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered in January, 1964. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

May a defendant be required to stand trial and a con-

viction be sustained where only hearsay evidence was presented to the grand jury which indicted him?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to U. S. Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty or property, without due process of law * * *"

Fourteenth Amendment to U. S. Constitution:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

The statement of the case set forth in the Petition seems adequate on the whole. It should be pointed out that the defendants were convicted on competent evidence adduced by a number of witnesses at the trial and no question of hearsay evidence at the trial is presented by Petitioners' Petition. Their complaint relates solely to the matter of hearsay evidence before the grand jury.

ARGUMENT

THE FACT THAT A GRAND JURY RETURNS A TRUE BILL OF INDICTMENT BASED ON HEARSAY EVIDENCE DOES NOT VIOLATE ANY RIGHT OF THE DEFENDANTS GUARANTEED BY THE FIFTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND A DEFENDANT MAY BE REQUIRED TO STAND TRIAL AND A CONVICTION SUSTAINED WHERE ONLY HEARSAY EVIDENCE WAS PRESENTED TO THE GRAND JURY RETURNING THE INDICTMENTS.

The sole question presented in this case, as set forth above, was completely settled by the decision of the Supreme Court of the United States in COSTELLO v. UNITED STATES, 350 U. S. 359, 76 S. Ct. 406, 100 L. ed. 397 (1956). In that case Mr. Justice Black, delivering the opinion of the Court, wrote in part as follows:

> "We granted certiorari in this case [Costello] to consider a single question: 'May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?' . . .
>
> * * * * * * *
>
> "The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. . . .
>
> * * * * * * *
>
> "In Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. Aside from the incompetent evidence 'there was very little evidence against the accused.' The Court refused to hold that such an indictment should be quashed, pointing out that 'The abuses of criminal practice would be enhanced if indictments could be upset on such a ground.' 218 U. S. at 248. The same thing is true where as here all the evidence before the grand jury was in the nature of 'hearsay.' If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist

on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

"Petitioner urges that this Court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

The Petitioners cite CAMPBELL v. UNITED STATES, 365 U. S. 85, 81 S. Ct. 421, 5 L. ed. 2d. 428 (1961) and argue certain matters relating to 18 U.S.C. § 3500 known as the "Jencks Act".

The Respondent submits that the CAMPBELL case has no bearing on the matter presented in the instant case and that the decision therein is irrelevant here. The question in the CAMPBELL case was the admission of certain evidence at the trial. No question is presented here of admissibility of evidence at the trial. The sole question is the adequacy of the testimony before the grand jury and that has been definitely and affirmatively determined against the Petitioners in the COSTELLO case, *supra*.

CONCLUSION

It is submitted that the Respondent has demonstrated that no right of the Petitioners guaranteed by the Fifth or Fourteenth Amendments to the Constitution of the United States was violated by trying them on indictments returned by a grand jury which acted on hearsay evidence.

Therefore, the Respondent urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

T. W. BRUTON
Attorney General of North Carolina

HARRY W. McGALLIARD
Deputy Attorney General

Justice Building
Raleigh, North Carolina,

Counsel for the State of North Carolina,
Respondent.